

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

CYNTHIA K. MUTHS,)	
)	
Appellant,)	Case No. 07R-148
)	
v.)	DOCKET ENTRY AND ORDER
)	AFFIRMING THE DECISION OF THE
SARPY COUNTY BOARD OF)	SARPY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Cynthia K. Muths ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on May 30, 2008, pursuant to an Order for Hearing and Notice of Hearing issued March 24, 2008. Commissioners Wickersham, Salmon, and Hotz were present. Commissioner Warnes was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code, ch. 4, §11 (10/07). Commissioner Wickersham was the presiding hearing officer.

Cynthia K. Muths was present at the hearing without legal counsel.

Michael A. Smith, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-

5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2007.

**II.
FINDINGS OF FACT**

The Commission found and determined that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as Lot 42, Prairie Ridge in Sarpy County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Sarpy County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Description: Lot 42, Prairie Ridge, Sarpy County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$107,240.00	\$107,240.00	\$107,240.00
Improvement	\$505,965.00	\$391,760.00	\$505,965.00
Total	\$613,205.00	\$499,000.00	\$613,205.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on March 24, 2008, set a hearing of the appeal for May 30, 2008, at 1:00 p.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value \$107,240.00

Improvement value \$505,965.00

Total value \$613,205.00.

9. The County Board offered to confess judgement for a value of \$612,893.00.
10. Actual value as determined by the Commission is exceeds the value for which an offer to confess was made.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over issues necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Supp. 21007).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).

6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
11. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination

of equalized values); and *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

19. If an offer to confess is made and the appellant does not obtain more relief than was offered to be confessed, the appellant shall pay all costs and fees the board incurred after making the offer. Neb. Rev. Stat. §77-1510.01 (Cum. Supp. 2006).

IV. ANALYSIS

The subject property is an improved residential parcel. The following description is derived from the county assessor's records as corrected after an inspection. The residence was built in 2006 with 2,690 square feet on the ground floor, a 3,632 square foot basement with 2,385 square feet of partition finish and a 971 square foot garage. (E15:1 & 2). The residence also has an attached garage with 1,361 square feet, a porch, a patio, wood decks, 2 fireplaces, and a built in bar. (E15:2). Heating for the residence is radiant floor heating with a heat pump. (E15:1). The Taxpayer testified that the exterior walls of the residence are twelve inch thick poured concrete.

Value as determined by the County Board was based on use of the cost approach. (E6:1 & 2 and E13). The Cost Approach includes six steps: "(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (5) Subtract the total amount of accrued depreciation from the total cost new of the

primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.” *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, pp. 128 - 129. The cost of various elements of the residence was determined based on data and calculations supplied by Marshall & Swift. (E6:2). The manual date for the costs used was 06/06. (E6:2). The Taxpayer contends that because the exterior walls of the residence are thicker than normal walls, twelve inches of poured concrete with siding and some brick, that the outside measurements when used in conjunction with the Marshall and Swift tables would overstate value. The belief that value would be overstated is based on an assumption that interior living space would be overstated in the calculations. The Marshall & Swift cost tables do not calculate the cost of living space the calculation is for the cost of a structure. Various construction techniques are recognized, and costs for each technique are stated for a single story residence of very good quality construction. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (6/2005), p. VG-13. Poured concrete walls is one of the construction techniques recognized by Marshall and Swift. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (6/2005), p. VG-13.

The Taxpayer testified that actual cost to construct was less than the amount determined by use of the Marshall & Swift cost tables. The Taxpayer also testified that she had acted as her own general contractor. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/

Boeckh, LLC, (6/2005), p. 2. Costs of a general contractor are costs included in the Marshall & Swift calculation. To the extent that another person wishing to own a home with poured concrete walls would be willing to act as their own contractor the Taxpayer's argument is valid. The fact that those costs are included in typical costs by Marshall & Swift is evidence that homeowners acting as their own general contractor is not typical. Marshall & Swift indicated that costs of a general contractor may be more than 12% of the contract costs. *Marshall & Swift Residential Cost Handbook, Marshall & Swift/ Boeckh, LLC, (12/2002), p. D-8.*

The Taxpayer testified that construction of the residence was not completed as of January 1, 2007, although it was being lived in. The elements that were not completed included some flooring, decorative columns, some painting and installation of some fixtures. The County Board considered the residence to be more than 90% completed and did not reduce its estimate of value for that factor. The cost to complete or install of the various elements which were not completed as of January 1, 2007 is unknown. The Commission cannot speculate about the amount of those costs.

The Taxpayer testified that inclusion of a separate cost item for radiant heat was not appropriate. Again that separate cost element is provided for by Marshall & Swift. *Marshall & Swift Residential Cost Handbook, Marshall & Swift/ Boeckh, LLC, (6/2005), p. VG-21.* Again the evidence from the manual is that the cost for that element is not included in other elements and is appropriate.

The Taxpayer testified that based on the costs as determined by the County Board using Marshall & Swift costing that it would have been cheaper to build an above ground garage rather than the basement garage found on the subject property. Whether one type of construction is less

costly than another is not before the Commission. The evidence is that the residence on the subject property has a basement garage. It is the contribution to value of the residence with the basement garage that is before the Commission. Evidence of the value attributed to other parcels for above ground garages is not relevant. A basement garage is obviously of a different type of construction than an above ground garage. In this case the evidence is that the garage has twelve inch poured concrete walls and is not comparable to a metal or frame building. In addition, evidence of the assessed value of improvements on another parcel cannot be evidence of actual value of a portion of an improvement on the subject property.

The County Board submitted an appraisal that was prepared before the residence was completed. That appraisal is Exhibit 31. The appraisal had been prepared for the American National Bank with an effective date of October 31, 2006. (E31:1). The estimate of value stated in that appraisal is \$689,700.00 based on use of the sales comparison approach. (E31:6). Actual value indicated by the cost approach as developed by the bank's appraiser was \$754,469.00. (E31:6). The appraiser did not testify.

The Taxpayer submitted an appraisal as Exhibit 3. The same appraisal was submitted by the County Board as Exhibit 37. The Taxpayer's appraisal has an effective date of August 10, 2007. The estimate of value stated in that appraisal is \$500,000.00 based on the sales comparison approach. (E3:3). Actual value as indicated by the cost approach as developed by the Taxpayer's appraiser was \$524,326.00. (E3:3). The appraiser did not testify. The Commission notes that the Taxpayer's appraiser rated construction quality as Good-PC. (E3:3). The bank's appraiser rated the quality of construction as excellent. (E31:6). The County Assessor rated the quality of construction as very good. (E6:1). The Taxpayer's appraiser

compared the subject property to parcels with residences of average quality of construction. (E3:3 and 8). The bank's appraiser adjusted for differences in quality of construction. (E31:6 and 11). The Taxpayer's appraiser believed that the residence contained 2,553 square. Square footage as determined by an appraiser for the county after an inspection was 2,690. (E15:1). That determination was not disputed by the Taxpayer. The Taxpayer's appraiser believed that the residence on the subject property contained 2,553 square feet and that 1,821 were finished. An appraiser for the county determined, after an inspection, that the square footage of basement was 3,632 and that 2,385 square feet of the basement were finished. Those determinations were not contested by the Taxpayer. The differences between the residence as described by the Taxpayer's appraiser and the appraiser for the county are material. A smaller home with a smaller basement with less finish could be expected to have a lower value than the residence as described by the appraiser for the county. As noted, size of the residence or the amount of basement or the finish of the basement were not disputed by the Taxpayer. The Commission does not consider the estimate of value shown in Exhibit 3 to be a credible estimate.

The County Assessor inspected the subject property after the County Board made its determination. The County Assessor's inspection resulted in various changes to the assessor's records. The changes in the County Assessor's records changed the cost approach estimate of value produced with use of the Marshall & Swift data to \$612,893.00. (E15:2). As noted above, the County Board had adopted an estimate of value based on the cost approach. For reasons noted above, evidence of the cost of construction is not adequate for an estimate of value. The only other evidence of actual value are the results of the cost approach as adopted by the County Board and the revised estimate produced by the County Assessor. An analysis of the County

Assessor's cost approach indicates a number of errors in the data utilized as a basis for the value adopted by the County Board. A decision is arbitrary when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000). The decision of the County Board was clearly based on the facts that were available to it and use of those facts with factors furnished by an independent party. The decision of the County Board was not arbitrary. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999). After various data corrections, the revised estimate of value based on the cost approach as prepared by the county assessor's office is \$612,893.00. (E15:1). Actual value as determined by the County Board was \$613,205.00. (E1:1). The difference is \$312 (\$613,205.00 - \$612,893.00 = \$312.00). While use of the cost approach as illustrated has a superficial precision, an estimate of value based on use of the cost approach is no more reliable than the data or the assumptions made in its use. The redetermination by the county assessor does not illustrate that the County Board's decision was unreasonable.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.

3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

VI.

ORDER

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is affirmed.
2. Actual value, for the tax year 2007, of the subject property is:

Case No. 07R-148

Land value \$107,240.00

Improvement value \$505,965.00

Total value \$613,205.00.

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.

5. The Taxpayer is shall pay all costs and fees of the County Board incurred after making its offer to confess. Those costs are to be certified to the Commission within 10 days of this order. All other costs are to be born by the party incurring them.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on June 25, 2008.

Signed and Sealed. June 25, 2008.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general the Commission may only grant relief on appeal if it is shown that the order, decision,

determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Supp. 2007).

Nebraska courts have held that the provisions of section 77-5016(8) of the Nebraska Statutes create a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *City of York v. York County Board of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003). The presumption cited in *York* has roots in the early jurisprudence of Nebraska. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.*

In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the district Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). Review of district court decisions made pursuant to section 77-1511 was de novo. *Future Motels, Inc. v. Custer County Board of Equalization*, 252 Neb. 565, 563 N.W.2d 785 (1997). The presumption functioned as a standard of review. See, e.g. *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 492 (1954).

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of

county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016 requires a finding that the decision being reviewed was unreasonable or arbitrary. The basis for that determination is the evidence presented to the Commission in a new record. See, Neb. Rev. Stat. §77-5016 (Cum. Supp. 2006). Commission decisions are reviewed for error on the record. See, Neb. Rev. Stat. 77-5019(5) (Cum. Supp. 2006). The statutory basis for Commission review and the review of its decisions is analogous to district courts review of decisions made by administrative agencies. The basis for district court review of decisions made by administrative agencies is *de novo* on the record. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005). The decisions of the district court examining the administrative decision are reviewed for error on the record. *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007). The similarities are enough to suggest that the framework for review applied to district court decisions could be made applicable to decisions of the Commission.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). As noted however review was *de novo* and the reviewing court was not bound by the standard of review imposed on district court. *Loskill v. Board of Equalization of Adams County*, 186 Neb. 707, 185 N.W.2d 852 (1971). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme

Court acknowledged that two standards of review existed for the district courts; one statutory, and the other judicial stated as a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the district courts.

The possible results from application of the presumption and the statutory standard of review by the Commission are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. If the presumption is overcome the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The second possibility does not therefore allow a grant of relief even though the presumption is overcome. The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, one remaining after the other has been met. See. *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The burden of proof to overcome the presumption is competent evidence. *City of York*, Supra. Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the

statutory standard of review remains even if the presumption is overcome. *City of York, Supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted. Each analysis of the standards of review allowing a grant of relief requires a finding that the statutory standard has been met.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 *Creighton L. Rev.* 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the possible conflict or difficulties inherent in the application of two standards of review. The *Gordman* analysis requires the Commission to consider all of the evidence produced in order to determine whether there is clear and convincing evidence that the decision,

action, order, or determination being reviewed was unreasonable or arbitrary. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner